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Supreme Court of the United States

October Term, 1974

No. 74-900

CITY OF PARMA, OHIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

October Term, 1974

No. .....

CITY OF PARMA, OHIO,
Petitioner,

vs.

FRANK J. BATTISTI, CHIEF JUDGE,
Respondent.

MOTION FOR LEAVE TO FILE ALTERNATE PETITION FOR WRIT OF MANDAMUS OR COMMON LAW CERTIORARI

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Supreme Court of the United States

October Term, 1974

No. .....

CITY OF PARMA, OHIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner, City of Parma, Ohio, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered on September 26, 1974, upon which petitioner's petition for rehearing was denied on November 18, 1974.

OPINIONS BELOW

Neither the decision of the district court, nor of the court of appeals, has been officially reported. The decision of the district court is set forth in the Appendix on Pages A-1 to A-2; the decision of the court of appeals rendered September 26, 1974 is set forth on Pages A-3 to A-5, and its denial of the timely-filed petition for rehearing is set forth on Page A-6.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on September 26, 1974; Petitioner's timely-filed petition for rehearing was denied on November 18, 1974.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED FOR REVIEW

Whether a municipality can appeal as of right to the court of appeals under 28 U.S.C. § 1292 (a) (1), or whether it is relegated to proceeding by way of a request for a writ of mandamus in the Supreme Court, to obtain review of a single-judge district court's dismissal of its compulsory counterclaim, seeking an injunction against the attempted usurpation of local-governmental functions by the Attorney General under the guise of enforcing the Fair Housing Act of 1968, and of the denial of its request to convene a three-judge court.

STATUTES INVOLVED

The text of 28 U.S.C. § 1292 (a) (1) is set forth in the Appendix at Page A-7, and of 28 U.S.C. § 2282 at Page A-7. Pertinent portions of the "Fair Housing Act of 1968", 42 U.S.C. § 3601 *et seq.*, are set forth on Pages A-7 to A-10.

STATEMENT OF THE CASE

Under color of 42 U.S.C. § 3613, the Attorney General filed suit in the name of the United States of America against the municipality of Parma, Ohio. He did so be-

cause in November, 1971 the people of Parma passed two ordinances by the initiative and referendum process, and because the city's building commissioner would not issue a building permit for a federally-subsidized housing project for the elderly since the plans did not conform to the requirements of Parma's codified ordinances.

One of the initiated ordinances was patterned on, and virtually identical with, Article XXXIV of the California Constitution, which this Court held to be constitutional and commendable in *James v. Valtierra*, 402 U.S. 137, 141 (1971). The other ordinance restored the former height limitation for residential buildings. Neither ordinance was in effect at the time of, and was not the basis for, the permit denial. The builder neither asked for any variance nor appealed the denial but instead built the virtually identical subsidized-project a few hundred feet west in the adjacent community, in compliance with its ordinances.

When the builder applied for F.H.A. financing for the project, it filed an "Affirmative Marketing Plan" advising the government that the expected tenants would be elderly persons from the ethnic groups who predominate in the area. Parma's population is in large part made up of descendants of immigrants who, being victims of Nativist prejudice and discriminatory laws such as the "National Origins Quotas" Immigration Acts, clustered in residential neighborhoods of like cultural and religious identity.

This ethnic grouping occurred naturally by free choice without any involvement of city officials. Few nonwhite persons chose to live in the Parma Area, and so the builder advised F.H.A. that it was not expected they would be attracted to the project. No nonwhites have moved into the project actually built, even though they were actively solicited to become tenants.

For more than a year, agents of the F.B.I. and attorneys from the Civil Rights Division of the Department of Justice "investigated" Parma. F.B.I. agents went to the homes of housewives who helped circulate the initiative petitions and questioned their motives for engaging in that democratic process. The attorneys demanded that the city officials repeal the initiated ordinances and issue permits for subsidized housing (although no applications had been submitted nor had the ordinances ever been applied). They threatened to sue Parma under the "Fair Housing Act of 1968", 42 U.S.C. § 3601 *et seq.*, unless this was done.

Parma's officials declined to submit to the federal attorneys' demands, questioning their authority to intrude into such purely local-governmental functions. The Attorney General filed suit on April 27, 1973, nearly eighteen months after the events of November, 1971.

When the district court overruled Parma's motion to dismiss the action for lack of federal court jurisdiction. Parma filed its answer, counterclaim, and request to convene a three-judge court. That pleading responded to the complaint, raised substantial constitutional issues, and prayed for an injunction against enforcement of 42 U.S.C. § 3601 *et seq.* for being repugnant to the Constitution on their face or as applied. The Attorney General filed no reply to, or motion to dismiss, the counterclaim; he filed only a brief in opposition to the request for a three-judge court. The district court denied Parma's motion to convene a three-judge court and dismissed its counterclaim on February 22, 1974 (App. pp. A-1 to A-2).

Parma appealed to the Court of Appeals for the Sixth Circuit from the order dismissing its counterclaim praying for an injunction against enforcement of 42 U.S.C. § 3601 *et seq.* for being repugnant to the Constitution, on the basis that said dismissal constituted the denial of an injunction

and was therefore an appealable order under 28 U.S.C. § 1292 (a) (1). It also appealed the denial of its motion to convene a three-judge court, the denial of needed discovery requested by Parma, and also contended that the district court lacked jurisdiction of the Attorney General's action.

Without reaching the merits, the court of appeals dismissed Parma's appeal on the ground that there was no final order under 28 U.S.C. § 1291. In its timely-filed petition for rehearing, Parma stressed its reliance on *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 433 (1932) for having the right to appeal under 28 U.S.C. § 1292 (a) (1), but the court of appeals denied its petition on November 18, 1974.

ARGUMENT

In dismissing petitioner's appeal pursuant to 28 U.S.C. § 1292 (a) (1), the court of appeals decided a federal question in conflict with applicable decisions of this Court and has so far departed from the accepted and usual course of procedure, and has so far sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision. The basic issue raised by Parma's counterclaim is the constitutionality of the "Fair Housing Act", as the Attorney General has attempted to apply it to a municipality performing its purely local-governmental functions. That issue has never been decided by this Court. By virtue of successive erroneous dismissals of Parma's attempt to raise this issue and to expedite review by this Court, the opportunity for such determination is being frustrated. Parma finds itself in a procedural web not of its making.

Until the Department of Justice actually carried out its attorneys' threat to sue, Parma had no claim "ripe" for injunctive relief. *Laird v. Tatum*, 409 U.S. 1 (1972). And when the Attorney General did sue, Rule 13 (a) of the Federal Rules of Civil Procedure required the claim to be filed in the same action as a compulsory counterclaim. 28 U.S.C. § 2282 mandates that an injunction restraining the enforcement, operation, or execution of any Act of Congress must be granted by a three-judge court.

Thus, when its motion to dismiss the Attorney General's action for lack of jurisdiction was overruled, Parma filed its answer, counterclaim, and request for convening of a three-judge court.

It makes no more difference that the constitutional issues raised by Parma constitute defenses to the action as well as support its claim for injunctive relief, than it does that the same issues raised by a defendant in a personal injury action constitute defenses as well as support his claim for damages. A claim for relief may be asserted by petition or by a counterclaim.

Thus, when the single-judge district court dismissed Parma's claim for injunctive relief, asserted by means of a compulsory counterclaim, and denied its request for a three-judge court, it was as much of a denial of an injunction as a dismissal of Parma's claim asserted by separate action would be.

Denial of a Counterclaim Praying for an Injunction Is Appealable Under 28 U.S.C. § 1292 (a) (1)

In *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 433 (1932), this Court squarely ruled on the appealability of a district court's dismissal of a counterclaim praying for injunctive relief. Therein, the Court of Ap-

peals for the Sixth Circuit held that it had jurisdiction of such an appeal under the identical predecessor section to 28 U.S.C. § 1292 (a) (1), and reversed the dismissal by the district court. In affirming the court of appeals' jurisdiction of the appeal, this Court held that:

> . . . the court necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction. It cannot be said, indeed plaintiffs do not claim, that the dismissal did not deny to defendants the protection of the injunction prayed for in their answer. The ruling of the Circuit Court of Appeals that an injunction has been denied by an interlocutory order which is reviewable under section 129 is sustained by reason and supported by the weight of judicial opinion. [Citations omitted.] Plaintiffs' motion to dismiss the appeal was rightly denied.

Among the numerous cases following said ruling are *Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 822, 826 (2d Cir. 1963), *cert. den.* 376 U.S. 944 (1964); *Hook v. Hook & Ackerman, Inc.*, 233 F.2d 180, 182 (3d Cir. 1956), *cert. den.* 352 U.S. 960; *Switzer Bros. v. Locklin*, 207 F.2d 483, 486 (7th Cir. 1953), *cert. den.* 347 U.S. 912 (1954) (denial to intervenor of leave to file counterclaim is appealable under 28 U.S.C. § 1292 (a) (1)); *Hancock Oil Co. v. Universal Oil Products Co.*, 115 F.2d 45 (9th Cir. 1940), *cert. den.* 314 U.S. 666.

Furthermore, a Rule 54 (b) certificate "is not required when an appeal may be prosecuted as a matter of right pursuant to 28 U.S.C. § 1292 (a) (1)." *Atlantic Richfield Co. v. Oil, Chemical and Atomic Workers International Union, AFL-CIO, et al.*, 447 F.2d 945, 947 (7th Cir. 1971); *George P. Converse & Co. v. Polaroid Corporation*, 242 F.2d 116 (1st Cir. 1957); *Pang-Tsu Mow v. Re-*

public of China, 201 F.2d 195 (D.C. Cir. 1952), *cert. den.* 345 U.S. 925 (1953).

Inasmuch as the Court of Appeals had jurisdiction under 28 U.S.C. § 1292 (a) (1), it also had jurisdiction to hear an appeal from the denial of defendant's request to convene a three-judge court. *Gold v. Lomenzo*, 425 F.2d 959, 961 (2d Cir. 1970); *McMillan v. Board of Education of State of New York*, 430 F.2d 1145, 1148 (2d Cir. 1970).

Applying the light shed by *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962), it is clear that since the constitutional issues raised by Parma are substantial and its counterclaim at least formally alleged a basis for equitable relief, it was impermissible for the single judge to withhold relief by dismissing the counterclaim.

CONCLUSION

Parma's claim for injunctive relief against the Attorney General's attempt to use the "Fair Housing Act" to usurp local authority is a particularly appropriate vehicle for testing the constitutionality of the Act on its face or as applied. It involves the question of whether employees of the Attorney General should be vested with unrestricted power to intrude into the affairs of, and institute costly litigation against, municipalities.

It raises substantial constitutional issues under the First, Fifth, Ninth, Tenth, and Fifteenth Amendments to the Constitution. Important issues of federalism, separation of powers, abuse of federal power, associational rights, and invidious discrimination against a community peopled by Caucasian minorities who have themselves suffered from

officially-sanctioned bigotry embodied in federal laws and tolerated by the national government, are involved.

It raises questions of whether agents of the F.B.I. should be used to harass housewives who have participated in the democratic process of initiative and referendum, and whether suits should be filed in the name of the United States for the benefit of private builders to free them from the constraints of local building and zoning regulations.

Thus, the issues raised by Parma in its claim for injunctive relief are of vital concern to the nation as well as to that municipality and its people.

When the district court erroneously dismissed the counterclaim and denied the motion to convene a three-judge court, the court of appeals had jurisdiction of an appeal from those rulings and should have exercised it, and in the interest of judicial economy should have considered the other questions presented.

It is therefore respectfully submitted that the writ of certiorari should be granted, and the action summarily remanded to the court of appeals to assume jurisdiction over the appeal filed by Parma.

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Supreme Court of the United States

October Term, 1974

No. .....

CITY OF PARMA, OHIO,
Petitioner,

vs.

FRANK J. BATTISTI, CHIEF JUDGE,
Respondent.

MOTION FOR LEAVE TO FILE ALTERNATE PETITION FOR WRIT OF MANDAMUS OR COMMON LAW CERTIORARI

Now comes the petitioner, City of Parma, Ohio, and respectfully moves this Court, in the event the foregoing Petition for Certiorari is not granted, for leave to file the Alternate Petition for Writ of Mandamus or Common Law Certiorari hereto annexed. Petitioner further moves that an order and rule be entered and issued directing the Honorable United States District Court for the Northern District of Ohio, Eastern Division, and the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, Eastern Division, to show cause why a writ of mandamus or common law writ of certiorari should not be issued against them in accordance with the prayer of said petition, and why your petitioner

should not have such other and further relief in the premises as may be just and meet.

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Supreme Court of the United States

October Term, 1974
No. .....

CITY OF PARMA, OHIO,
Petitioner,

vs.

FRANK J. BATTISTI, CHIEF JUDGE,
Respondent.

PETITION FOR A WRIT OF MANDAMUS OR COMMON LAW CERTIORARI

To the United States District Court for the Northern District of Ohio, Eastern Division, and the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, Eastern Division

Petitioner prays for a writ of mandamus or a common law writ of certiorari directed to the United States District Court for the Northern District of Ohio, Eastern Division, and to the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, Eastern Division, commanding them or either of them to proceed to convene a three-judge court, pursuant to the provisions of 28 U.S.C. § 2282 and 2284 and further commanding the rescission of protective orders granted to prevent the taking of depositions of various United States Government officials.

CITATION TO OPINIONS BELOW

In addition to the opinions cited above at Page 1, the order of the district court granting protective orders denying needed discovery to Parma has not been officially reported and is set forth in the Appendix at Page A-14.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1651 (a).

QUESTIONS PRESENTED

1. Whether, in an action wherein a compulsory counterclaim is filed seeking to enjoin enforcement of the "Fair Housing Act of 1968" for being repugnant to the Constitution on its face or as attempted to be applied by the Attorney General to municipalities exercising local-governmental functions, a single-judge district court is required to request the convening of a three-judge court.

2. Whether the district court abused its discretion in summarily granting protective orders preventing defendant municipality from deposing designees of the plaintiff-Attorney General and Secretary of H.U.D., and misapplied the "work-product" doctrine.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix as noted on Page 2, above.

STATEMENT OF THE CASE

Petitioner incorporates herein by reference as if fully rewritten the statement of the case set forth above at Pages 2 to 5. In addition, petitioner states that on February 25, 1974, it served and filed a notice to take depositions of the Secretary of the Department of Housing and Urban Development and of the Attorney General, or their respective designees as provided in Rule 30 (b) (6) of the Federal Rules of Civil Procedure, and on March 1, 1974 it served and filed a notice to take the deposition of Richard G. Kleindienst. The district court on March 27, 1974 granted the protective orders requested by the Attorney General, as indicated in the transcript of the hearing held on said date set forth in the Appendix at Pages A-11 to A-13. The order entirely precluded taking the depositions of the Attorney General's designees and Mr. Kleindienst, and limited the scope of inquiry as to the designees of H.U.D.'s Secretary.

REASONS FOR GRANTING THE WRITS

I. The District Court Erred in Refusing to Convene a Three-Judge Court.

In response to the complaint by the United States, petitioner filed a compulsory counterclaim, challenging the constitutionality of the "Fair Housing Act of 1968", as applied to petitioner, and seeking to enjoin its further enforcement. This Court has clearly enunciated the test for granting a three-judge court in *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U.S. 713, 715 (1962):

> When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the . . . [answer and counterclaim] at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute.

This test has been followed by lower courts in cases such as *Melendez v. Schultz*, 486 F.2d 1032, 1033 (1st Cir. 1973), *Gold v. Lomenzo*, 425 F.2d 959 (2d Cir. 1970), *Rowland v. Tarr*, 480 F.2d 545 (3d Cir. 1973). Therefore, petitioner contends the decision of the district court denying petitioner's motion to convene a three-judge court was not consonant with the controlling decision of the Court and its progeny, was arbitrary, and an abuse of discretion.

Petitioner appealed this question to the Court of Appeals for the Sixth Circuit on theories that:

(1) the refusal to convene a three-judge court was an effective denial of a claim seeking to enjoin enforcement of an unconstitutional law;

(2) in the interest of judicial economy, the appellate court was obliged to rule on this issue which was ancillary to the dismissal of the counterclaim.

Inasmuch as the court of appeals refused to consider the issue (App. p. A-5), petitioner seeks relief in this Court by way of mandamus. *Ex parte Bransford*, 310 U.S. 354, 355 (1940); *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U.S. 10 (1930); *Ex parte Williams*, 277 U.S. 267 (1928). See also *Fiumara v. Texaco, Inc.*, 240 F. Supp. 325, 326 (E.D. Pa. 1965); *Miller v. Smith*, 236 F. Supp. 927 (E.D. Pa. 1965).

II. The District Court Erred in Granting Protective Orders to Prevent Deposing the Attorney General or His Designees.

Petitioner sought to take depositions from the Attorney General of the United States, the Secretary of Housing and Urban Development, or their respective designees. Instead, the district court granted protective orders to restrain petitioner's counsel in their attempt to construct a defense. As the record of the proceedings show (App. pp. A-11 to A-12), there was no reason stated for restricting the scope of questioning as to the H.U.D. designees. Parma raised the issue that this action invidiously discriminated against white minorities and so the information sought under liberal rules of discovery had a bearing on that issue.

Apparently the only basis for refusing to permit discovery by deposition of the plaintiff Attorney General's designees was the assumption the designees would be attorneys. Both attorneys and F.B.I. agents "investigated" Parma and thereby presumably had knowledge of discoverable facts. That plaintiff is a government official does not insulate him against being subject to discovery as is any other litigant.

> . . . the government cannot assert any absolute privilege against discovery of information and materials in its possession relevant to the matters at issue; it cannot make charges against a party and then refuse to let him know the basis of the charges . . . .
>
> (2 MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE § 1502, p. 1065.)

However, even if this were not the generally-accepted rule, the proceedings conducted below clearly evidence a misunderstanding of the "work product" concept as ex-

pressed by this Court in *Hickman v. Taylor*, 329 U.S. 495 (1947) and authorities since then. As an example of information which petitioner might seek to obtain, see *B. & S. Drilling Co., Inc. v. Halliburton Oil Well Cementing Co.*, 24 F.R.D. 1, 5 (D.C. Tex. 1959).

In the Court of Appeals for the Sixth Circuit, petitioner urged consideration of this question, citing *Semmes Motors, Inc. v. Ford Motor Company*, 429 F.2d 1197, 1201 (2d Cir. 1970), *Barber-Greene Co. v. Blaw-Knox Co.*, 239 F.2d 774, 776 (6th Cir. 1957), *Texaco, Inc. v. Borda*, 383 F.2d 607 (3d Cir. 1967). Inasmuch as that court refused to consider so clear an instance of gross abuse of discretion, petitioner seeks relief here by way of mandamus or common law certiorari.

WHEREFORE, petitioner prays the Court that a writ of mandamus or common law certiorari issue, directed to the said Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, Eastern Division, ordering and directing him to notify the Chief Judge of the United States Court of Appeals for the Sixth Circuit of the presentation of a counterclaim requiring the designation of additional judges by said Chief Judge in accordance with the provisions of Section 2284, Title 28, United States Code; and further, that a writ of mandamus or common law certiorari issue, directing and commanding the said Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, Eastern Division, to vacate, annul, and set aside his order of March

27, 1974 which granted the government's motion for protective orders.

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APPENDIX



DECISION OF DISTRICT COURT

(Entered February 22, 1974)

No. C 73-439

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY OF PARMA, OHIO,
Defendant.

ORDER

Parma's self-styled "counterclaim" and request to convene a three-judge court pursuant to 28 USC §2282 seeks to enjoin, at its incipient stage, a lawsuit duly commenced by the Attorney General pursuant to authority vested in him under 42 USC §3613 of the Fair Housing Act. Any constitutional objections Parma may have to this suit, in particular its seeming contention that it would be unconstitutional to apply the Fair Housing Act to municipalities, should be raised therein as defenses. *See e.g., United States v. Hunter,* 459 F.2d 205, 211 (4th Cir. 1972), *cert. denied,* 409 US 934 (1972). Moreover, no substantial constitutional question is presented by Parma's "counterclaim." *See e.g., Jones v. Alfred H. Mayer Co.,* 392 US 409 (1968); *Kennedy Park Homes Assoc. v. City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 US 1010 (1971).

Accordingly, Parma's motion to convene a three-judge court is denied, and its "counterclaim" is dismissed. *Ex Parte Poresky*, 290 US 30 (1933); *Bailey v. Patterson*, 369 US 31 (1962).

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Judge

JUDGMENT OF COURT OF APPEALS

(Entered September 26, 1974)

No. 74-1643

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CITY OF PARMA, OHIO,
Defendant-Appellant.

ORDER ON MOTION OF THE UNITED STATES TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM

Before WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

Defendant-appellant, City of Parma, Ohio, has appealed to this Court from Orders of the District Court dismissing its counterclaim which sought to enjoin enforcement of the Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq., and applicable regulations; denying its motion to convene a three-judge court pursuant to 28 U.S.C. § 2282 to determine the constitutionality of the Act; and granting the motions of the United States for protective orders in connection with discovery.

The complaint filed by the Government in the District Court alleged that Parma had engaged in a pattern and practice of discrimination in housing, in violation of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601

et seq., and prayed for an order enjoining Parma from engaging in any discriminatory practice and requiring it to remove all obstacles to equal housing opportunity, including ordinances.

Parma filed an answer and counterclaim, both of which alleged constitutional violations on the part of the Government. The prayer to both the answer and the counterclaim was for dismissal of the complaint; that a three-judge court be convened to declare 42 U.S.C. § 3601 et seq. and applicable regulations issued pursuant thereto unconstitutional on its face and as applied; and for an order enjoining the Government and any of its officers and agents from enforcing the same.

The District Court declined to convene a three-judge court, holding that the constitutional attack lacked substantiality, and it sua sponte dismissed the counterclaim, holding that the case was ripe for decision. The same issues were involved in the complaint and the answer thereto. The Court granted motions for protective orders.

The Government contends that no final appealable order has yet been entered by the District Court, and that we have no jurisdiction to entertain an appeal from any of the orders from which the appeal was taken.

The case is still pending in the District Court on the complaint filed by the Government and Parma's answer thereto. Parma did not request from the District Court the certificate provided by 28 U.S.C. § 1292(b) for an interlocutory appeal, and no certificate has been issued. No appeal can be taken until the District Court has resolved the remaining issues. *Oak Constr. Co. v. Huron Cement Co.*, 475 F.2d 1220 (6th Cir. 1973). The fact is that at any time during pendency of the case in the District Court the Court could vacate its order dismissing the counterclaim and reinstate it.

Parma contends that its appeal from the order dismissing the counterclaim was taken under 28 U.S.C. § 1292(a)(1), and that it is not necessary to comply with 28 U.S.C. § 1292(b). The trouble with this contention is that the District Court has not granted, continued, modified, refused, nor dissolved any injunction. Under the prayer for relief in the answer the Court may grant or refuse to grant such relief.

The order denying the request for the convening of a three-judge court is not a final appealable order. Such an order may be reviewed by the Court of Appeals when a final order has been entered. If it is later determined that a three-judge court should have been convened, then the judgment of the single Judge would have to be reversed for lack of his jurisdiction to hear the case. *Cancel v. Wyman*, 441 F.2d 553 (2d Cir. 1971); *Lindauer v. Oklahoma City Urban Renewal Authority*, 439 F.2d 761 (10th Cir. 1970); *Lyons v. Davoren*, 402 F.2d 890 (1st Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969).

In determining whether a three-judge court should have been convened all of the allegations contained in the answer, as well as those contained in the counterclaim, would have to be considered.

The protective orders issued by the District Court are not final appealable orders. They may, however, be fully reviewed as soon as a final appealable order has been entered. *Korman v. Shull*, 310 F.2d 373 (6th Cir. 1962).

The parties may also apply to the District Court for leave to amend their pleadings.

The appeal is dismissed for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

ORDER DENYING REHEARING

(Entered November 18, 1974)

No. 74-1643

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VS

CITY OF PARMA, OHIO,
Defendant-Appellant.

ORDER

Before WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

No active Judge of this Court having requested that a vote be taken on the suggestion for an en banc hearing, contained in the petition for rehearing, the petition for rehearing came on for consideration by the panel.

Upon consideration thereof it is ORDERED that said petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

RELEVANT STATUTES

Title 28, United States Code

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

§ 2282. Injunction against enforcement of Federal statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

Title 42, United States Code

§ 3601. Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

Pub.L. 90–284, Title VIII, § 801, Apr. 11, 1968, 82 Stat. 81.

§ 3602. Definitions

As used in this subchapter—

(a) "Secretary" means the Secretary of Housing and Urban Development.

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, or 3606 of this title.

(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

Pub.L. 90–284, Title VIII, § 802, Apr. 11, 1968, 82 Stat. 81.

• • • • •

§ 3604. Discrimination in the sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.

Pub.L. 90–284, Title VIII, § 804, Apr. 11, 1968, 82 Stat. 83.

* * * * *

§ 3613. Enforcement by the Attorney General; issues of general public importance; civil action; Federal jurisdiction; complaint; preventive relief

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

Pub.L. 90-284, Title VIII, § 813, Apr. 11, 1968, 82 Stat. 88.

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PORTION OF TRANSCRIPT OF PROCEEDINGS

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACQUELINE CORNELIUS, *et al.*, *Plaintiffs*, vs. CITY OF PARMA, *Defendant.*	Civil Action No. C 73-437
UNITED STATES OF AMERICA, *Plaintiff*, vs. CITY OF PARMA, *Defendant.*	Civil Action No. C 73-439

TRANSCRIPT OF PROCEEDINGS BEFORE THE HON. FRANK J. BATTISTI, CHIEF JUDGE OF SAID COURT, ON WEDNESDAY, MARCH 27, 1974.

* * * * *

The Court: Now, there are some protective orders to be considered.

The first protective order relates to Parma's seeking to depose the Secretary of HUD or his deputy.

I also understand that these depositions were sought to be taken in Washington, D. C. It has been brought to my attention that the Secretary has designated officers who may be deposed in Chicago, and Cleveland; is that

Mr. Goldberg: That's correct, your Honor.

The Court: Correct?

Mr. Boyko: Yes, your Honor, except that in our motion—in our notice it was "designee" rather than "deputy." "Any designee."

The Court: All right. Well, the designees have been noted.

Mr. Boyko: Yes.

The Court: And the depositions will be taken in Chicago and Cleveland.

Mr. Boyko: Yes.

The Court: And that is so ordered.

Now, I am further informed that the defendant wishes —that is, the City of Parma—wishes to inquire of these designess as to violations, if any, in other municipalities around the country; is that correct?

Mr. Boyko: That is one of the reasons, yes, your Honor.

The Court: And the Government moves for a protective order in that regard; correct?

Mr. Goldberg: That's correct, your Honor.

The Court: And that protective order is granted. You cannot inquire into that subject.

Finally—well, no, I don't think this will conclude. But there is also a motion for a protective order in connection with the City of Parma's seeking to depose the Attorney General Saxbe and the former Attorney General Richard Kleindeinst.

Mr. Boyko: Or their designees.

The Court: Or their designees?

Mr. Boyko: That's what it calls for.

Mr. Goldberg: That's correct, your Honor.

Mr. Boyko: Except for former Attorney General Kleindeinst. But Attorney General Saxbe or his designee. correct?

The Court: Well, the Government has resisted that. Very quickly and briefly, with regard to designees, what is the problem?

Mr. Goldberg: Well, they want to inquire—

The Court: Oh, I'm sorry. We are dealing with attorneys here. We are really dealing with the Department of Justice and they are acting for the Department; correct?

Mr. Goldberg: Well, as counsel for defendant informed me orally, they want to inquire into our Sherlock Holmes activity in the City of Parma. We had furnished the facts in answers to interrogatories, and if they believe those answers to be deficient in any way we suggest that they move to compel answers under Rule 37, rather than take the former Attorney General Kleindeinst's time or that of the designees of Attorney General Saxbe or Mr. Saxbe himself.

The Court: Who could only be one of the attorneys—

Mr. Goldberg: That's correct.

The Court: —in the Department of Justice; correct?

Mr. Goldberg: That's correct.

The Court: The motion for the protective order in that regard is sustained.

ORDER OF DISTRICT COURT

(Entered March 27, 1974)

Civil Nos. 73-437, 73-439

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACQUELINE CORNELIUS, *et al.*,
Plaintiffs,

VS

CITY OF PARMA, *et al.*,
Defendants.

ORDER

Upon consideration,

IT IS ORDERED that the motion of the Plaintiffs to stay proceedings in C73-439 is hereby granted; further,

IT IS ORDERED that the motion of the Plaintiffs to expedite certification of record is hereby granted; further,

IT IS ORDERED that the motions of the Government for protective orders are hereby granted; further,

IT IS ORDERED that the motion of Defendant to modify protective order granted March 14, 1974 is hereby overruled subject to reconsideration if parties fail to agree to deposition date; further,

IT IS ORDERED that the oral motion of Defendant to send only parts of record to U.S. Court of Appeals is hereby overruled; further,

IT IS ORDERED that all discovery is stayed pending appeal and will be completed one month after appeal has been decided.

/s/ FRANK J. BATTISTI
Chief Judge



In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-900

CITY OF PARMA, OHIO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI, MANDAMUS, OR COMMON LAW CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the district court (Pet. App. A-1 to A-2) and the court of appeals (Pet. App. A-3 to A-5) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-3 to A-5) was entered on September 26, 1974. A timely motion for rehearing was denied on November 18, 1974 (Pet. App. A-6). The petition for a writ of certiorari, mandamus, or common law certiorari was filed on January 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 1651(a).

QUESTIONS PRESENTED

1. Whether the dismissal of petitioner's "counterclaim," which requested that the United States be enjoined from further prosecuting this housing discrimination suit, was an appealable order under 28 U.S.C. 1292(a)(1).

2. Whether petitioner's "counterclaim" presents a substantial constitutional question requiring the convention of a three-judge district court.

3. Whether the district court abused its discretion in granting the United States' request for certain protective orders.

STATUTES INVOLVED

The pertinent provisions of 28 U.S.C. 1292 and 42 U.S.C. 3604 and 3613 are set forth at Pet. App. A-7, A-9 to A-10.

STATEMENT

On April 27, 1973, the United States brought an action against petitioner, the City of Parma, Ohio, alleging that petitioner had engaged in a pattern and practice of discrimination in housing, in violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, and requesting that petitioner be enjoined from engaging in any discriminatory practice and ordered to eliminate all legal obstacles to equal housing opportunity (Pet. App. A-3 to A-4). Petitioner filed an answer and "counterclaim" and requested the convention of a three-judge court pursuant to 28 U.S.C. 2282. Petitioner's "counterclaim" requested an order declaring the Fair Housing Act unconstitutional as applied and enjoining the United States from enforcing the Act against petitioner (Pet. App. A-4). On February 22, 1974, the district court held that "[a]ny constitutional objections [petitioner] may have to this suit * * * should be raised therein as defenses" (Pet. App. A-1), and that in any event petitioner's counterclaim

presented no substantial constitutional question. Accordingly, the court dismissed the counterclaim and denied the motion to convene a three-judge district court (Pet. App. A-2).

In addition, the district court granted the United States' requests for protective orders in regard to certain discovery matters (Pet. App. A-11). Petitioner had propounded comprehensive interrogatories, which the United States answered in considerable detail. Subsequently, petitioner served notice on the United States to take the depositions of Attorney General William B. Saxbe or his designee; of James T. Lynn, Secretary of the Department of Housing and Urban Development, or his designee; and of former Attorney General Richard G. Kleindienst. The United States moved to limit the scope of the deposition of any designee of Secretary Lynn and to prevent the taking of depositions of Attorney General Saxbe or his designee and of Mr. Kleindienst, principally on the ground that no showing of need had been made to take the depositions of high-ranking officials or of litigating attorneys and that other less burdensome means of discovery were available and had in fact been utilized.

Petitioner appealed from these various pretrial orders. The court of appeals dismissed the appeal for lack of jurisdiction. The court held (Pet. App. A-3 to A-5) that the district court's orders were not appealable as final orders under 28 U.S.C. 1291, that the district court had not granted or refused an injunction so as to confer interlocutory jurisdiction on the court of appeals under 28 U.S.C. 1292(a)(1), and that petitioner had not sought certification of the district court's order under 28 U.S.C. 1292(b).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the district court, by dismissing petitioner's "counterclaim," denied an injunction and thereby entered an interlocutory order appealable under 28 U.S.C. 1292(a)(1). But petitioner's "counterclaim" for injunctive relief was in reality not a counterclaim but merely a defense to the charge of housing discrimination.[1] The declaratory and injunctive relief requested by petitioner was nothing more or less than dismissal of the suit against it. Its "counterclaim" was therefore functionally equivalent to a motion to dismiss. The denial of such a motion is not appealable, whether the motion is made directly or, as here, presented in the guise of a counterclaim. See *Western Geophysical Co. of America, Inc.* v. *Bolt Associates, Inc.*, 463 F.2d 101 (C.A. 2).[2]

The appealability, under 28 U.S.C. 1292(a)(1), of interlocutory orders denying injunctions is an exception to the general rule against piecemeal appeals; accordingly, that provision should be strictly construed. If petitioner were permitted to obtain pretrial appellate review merely by styling its defense as a counterclaim, a broad avenue would be opened to defendants generally by which the rule against piecemeal appeals could be easily circumvented.

2. Petitioner requests (Pet. 14-15) an extraordinary writ of mandamus or common law certiorari to review the district court's refusal to convene a three-judge district court. There is no occasion here for the issuance of an extraordinary writ.

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[1]Moreover, petitioner's asserted constitutional defense has been preserved as petitioner's fifth defense in its answer to the complaint. Thus the dismissal of the "counterclaim" has not impaired petitioner's ability to litigate its constitutional claim before the district court.

[2]Petitioner relies on *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430, for the proposition that interlocutory orders denying counterclaims that seek injunctive relief are appealable under 28 U.S.C. 1292(a)(1). However, *General Electric* involved a genuine counterclaim. As the court of appeals held in *Western Geophysical Co. of America* v. *Bolt Associates, supra*, 463 F.2d at 104, a party is not entitled to an exception to the rule against appealing interlocutory orders merely by labelling its defense a counterclaim.

An order denying convention of a three-judge court is not appealable. See *Cancel* v. *Wyman*, 441 F.2d 553 (C.A. 2); *Lyons* v. *Davoren*, 402 F.2d 890 (C.A. 1), certiorari denied, 393 U.S. 1081. There is no reason here to depart from the rule against piecemeal review; petitioner shows no reason why its interests would not be adequately protected by review after a final order. In any event, the refusal to convene a three-judge district court was correct, for petitioner's challenge to the Fair Housing Act raises no substantial constitutional question. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409; *Williams* v. *The Matthews Co.*, 499 F.2d 819 (C.A. 8), certiorari denied November 18, 1974, Nos. 74-63 and 74-296; *United States* v. *Bob Lawrence Realty, Inc.*, 474 F.2d 115 (C.A. 5), certiorari denied, 414 U.S. 826; *Mayers* v. *Ridley*, 465 F.2d 630 (C.A.D.C.) (*en banc*).

3. Petitioner also requests (Pet. 16-17) that a writ of mandamus issue directing the district court to set aside certain protective orders limiting the scope of petitioner's pretrial discovery.

It is well settled that questions relating to discovery are committed to the sound discretion of the district court and that the court's discovery orders will not be disturbed on appeal in the absence of a clear showing of error. *Baker* v. *F & F Investment*, 470 F.2d 778, 781 (C.A. 2); *Southern Ry. Co.* v. *Lanham*, 403 F.2d 119, 126 (C.A. 5); *Tiedman* v. *American Pigment Corp.*, 253 F.2d 803, 808 (C.A. 4). The protective orders issued here by the district court were proper. The testimony of cabinet officials and persons in comparable positions may not be required in the absence of a strong showing of need. *Wirtz* v. *Local 30, International Union of Operating Engineers*, 34 F.R.D. 13 (S.D. N.Y.); *United States* v. *Northside Realty Associates, Inc.*, 324 F. Supp. 287, 293-295 (N.D. Ga.); *Capitol Vending Co., Inc.* v. *Baker*, 36 F.R.D. 45 (D. D.C.). The same standard applies in regard to the depositions of attorneys litigating a case. *Hickman* v. *Taylor*, 329 U.S. 495, 510-512; *Gajewski* v. *United States*, 321 F.2d 261 (C.A. 8). Petitioner has made no such showing here.

Moreover, this Court has confined the use of the extraordinary writs to exceptional cases presenting issues of unusual public importance. *Ex parte Peru*, 318 U.S. 578. This is not such a case. Furthermore, such writs are particularly inappropriate as mechanisms for reviewing interlocutory discovery orders. *Donnelly* v. *Parker*, 486 F.2d 402, 408 n. 28 (C.A.D.C.). Cf. *Will* v. *United States*, 389 U.S. 90; *Bankers Life and Cas. Co.* v. *Holland*, 346 U.S. 379. And see *International Business Machines Corp.* v. *Edelstein*, 416 U.S. 979; *International Business Machines Corp.* v. *United States*, 416 U.S. 980.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari and the motion for leave to file an alternate petition for a writ of mandamus or common law certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

BRIAN K. LANDSBERG,
JUDITH E. WOLF,
Attorneys.

MARCH 1975.

SUPREME COURT, U. S.

FILED

MAR 20 1975

No. 74-206

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

CITY OF PARMA, OHIO, Petitioner

vs.

UNITED STATES OF AMERICA, et al., Respondents

On Petition for a Writ of Certiorari, Mandamus, or Common Law Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

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SUPREME COURT of the UNITED STATES

October Term, 1974

No. 74-900

CITY OF PARMA, OHIO, Petitioner

vs.

UNITED STATES OF AMERICA, et al., Respondents

On Petition for a Writ of Certiorari, Mandamus, or Common Law Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

One of the implicit, underlying issues to be decided by the Court in this case is whether the Federal Rules of Civil Procedure are a liberating force in the quest for justice or a trap which no amount of professional acumen can avoid.

In the district court, petitioner filed a compulsory counterclaim which sought to enjoin enforcement of the Fair Housing Act for being repugnant to the Constitution on its face or as applied to municipalities. Petitioner claims that under our federalism the Attorney General has no

constitutional right to usurp local-government functions in the guise of enforcing that Act, or to interfere with the precious right to vote on local issues, or to divert the F.B.I. from its proper activities (such as apprehending the elusive Weathermen terrorists) by ordering its agents to question the motivation of housewives engaged in participatory democracy.

Petitioner sought to enjoin such ultra vires activity of the Attorney General's employees against municipalities - not just to defeat the present action. Otherwise, the Attorney General could bring repeated actions: whenever a builder does not get away with failing to conform to local building and zoning ordinances and someone cries "discrimination". No municipality of Parma's size and limited resources could stand the financial burden of repeated defenses against the seemingly limitless tax-supplied resources of the Department of Justice.

Rule 13(a), F.R. Civ. P., mandated that Parma present its claim for injunctive relief as a compulsory counterclaim in the same suit filed by the Attorney General. Had Parma sued in a separate action and the district court refused to convene a three-judge court, and dismissed the action, there is no doubt Parma could have appealed to the Court of Appeals. Gonzalez v. Automatic Employees Credit Union, _____ U.S. _____, 95 S. Ct. 289, 43 L.W. 4025 (1974).

It was Rule 8 and Rule 13(a) which required Parma to denominate its claim for relief a "counterclaim", and Rule 13 which mandated that it must be filed in the action, brought by the Attorney General, which ripened Parma's claim into an Article III case or controversy.

Respondents' Citations are Inapposite

No case is cited by the Solicitor General which has decided the constitutional issues raised by Parma. This Court has not yet ruled on the constitutionality of interferring with such purely local-government functions as enforcing building and zoning restrictions. Thus, it cannot be said that the constitutional issues raised by Parma are insubstantial.

Respondents' reliance on Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc., 463 F.2d 101 (2nd Cir. 1972) is misplaced, for it is distinguishable from our case. Here only one counterclaim, rather than several, is involved. The prior decision in Western Geophysical, at 440 F.2d 765, 770, clearly held that "only one counterclaim seeking injunctive relief ... would have been appealable under 28 U.S.C. § 1292 (a)(1)." In Ambercrombie & Fitch Co. v. Hunting World, Inc., 461 F. 2d 1040, 1042 (2nd Cir. 1972), the same Court of Appeals held that the rationale of Western Geophysical "was that no single counterclaim had been dismissed in its entirety and that the full extent of injunctive relief prayed for by the defendant could still be secured in each of its counterclaims'. Here, there is only one compulsory counterclaim involved - a claim for injunctive relief filed because Rule 13(a) required it to be filed herein rather than as a separate suit. It is a genuine counterclaim and not merely a defense, for it seeks an injunction against future attempts to misuse the Fair Housing Act and not just to defeat the Attorney General's action (which should be defeated because it lacks merit even without reaching the constitutional issues). As stated in footnote 3, 463 F.2d at 104, this case presents the opportunity to reconsider General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932) and to instruct the lower courts to

follow the proper procedure in a case such as this. Surely a litigant compelled to present a claim for injunctive relief as a compulsory counterclaim should not fare worse than a litigant who presents the same claim by an independent action. Either the compulsory counterclaim rule should not apply or the Court of Appeals should be required to hear the appeal under 28 U.S.C. § 1292 (a)(1).

Finally, in the present action, neither the Attorney General nor the Secretary of HUD need personally appear at the deposition; Rule 30 (b)(6) specifically permits each to select "designees". But if attorneys conduct the "investigation" of a potential defendant, then they are just as subject to being deposed concerning facts as are city officials, and they are not rendered immune by also conducting the litigation. The two functions can easily be divided among the Attorney General's staff rather than being merged so as to prevent needed discovery - if the trial is to be a serious search for truth and not a means of suppressing evidence unfavorable to the Attorney General.

Petitioner's petition involves substantial issues of national importance and warrants the granting of review.

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